

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

VS.

**NEWMONT USA LIMITED AND DAWN
MINING COMPANY, LLC,**

Defendants.

NO. CV-05-020-JLQ

DAWN MINING COMPANY, LLC,

Third-party Plaintiff,

VS.

ORTENCIA FORD and DONNELLY
VILLEGOS.

Third-party Defendants.

**ORDER GRANTING IN PART AND
DENYING IN PART THE UNITED
STATES' MOTION FOR SUMMARY
JUDGMENT ON THE ISSUE OF
RESPONSE COSTS**

BEFORE THE COURT is the United States' Motion For Summary Judgment on the Issue of Response Costs. (Ct. Rec. 130). The court heard oral argument on July 3, 2007. Assistant United States Attorney Michael Zevenbergen argued on behalf of the Government. Elizabeth H. Tempkin argued on behalf of Newmont USA Limited (hereinafter "Newmont"). Mark W. Schneider argued on behalf of Dawn Mining

1 Company, LLC (hereinafter “Dawn”). The purpose of this motion is to establish the
2 amount of costs for which the responsible parties are liable through December 31, 2004.
3 Apparently, once issues of liability are determined, the Government will bring another
4 later suit to recover the costs associated with implementing the cleanup.

5 Defendants Newmont and Dawn do not dispute that the United States incurred
6 \$12,867,441, plus interest, in response costs through December 31, 2004. Instead,
7 Defendants oppose the United States’ motion in four respects. First, Defendants argue
8 that the United States’ exclusive remedy is provided under the mining leases. As
9 explained in the court’s prior order regarding Dawn’s liability, this argument is without
10 merit and therefore shall not be addressed herein. Second, Defendants argue that the
11 Government’s response action is arbitrary and capricious because the Administrative
12 Record does not support the remedy chosen by the EPA, and therefore the costs are not
13 recoverable. Third, the Defendants argue that some of the sampling conducted by the
14 Government at the site was not consistent with the National Contingency Plan
15 (hereinafter “NCP”) because the sampling was duplicative and therefore those costs are
16 not recoverable. Fourth, Defendants argue that the Agency for Toxic Substances and
17 Disease Registry’s activities at the site were inconsistent with the NCP and therefore the
18 approximately \$520,000 in costs associated with that agency’s actions are not
19 recoverable. At oral argument, the Government conceded this fourth argument.
20 Accordingly, the United States’ motion is **DENIED in part** and judgment shall not be
21 entered as to costs incurred by the Agency for Toxic Substances and Disease Registry.
22 For purposes of resolving this motion, the court need only focus its attention to the
23 Defendants’ second and third arguments.

24 I. Background

25 Through December 31, 2004, the United States incurred response costs totaling
26 \$12,867,441 performing response actions at the Midnite Mine Site, exclusive of
27 prejudgment interest. (United States St. Fact ¶ 55). A complete accounting of the
28 Government’s response costs are set forth in the Cost Summery attached to Wiley

1 Wright's declaration. (Wright Decl. ¶ 17; Cost Summary). The Government's detailed
2 accounting is not challenged by Defendants and need not be recited here. In short, the
3 United States Department of Justice incurred \$216,108 in litigation costs and the
4 Environmental Protection Agency (hereinafter "EPA") incurred \$12,651,333 in internal
5 costs and costs expended on outside contractors. (Kime Decl. ¶ 8; Wright Decl. ¶ 17).

6 Primarily, these costs were incurred performing action related to studying the
7 environmental conditions at the Midnite Mine Site. Beginning in 1998, the EPA
8 performed an Expanded Site Investigation ("ESI") with the assistance of contractors.
9 (United States' St. Fact ¶ 8). Through the ESI, the EPA identified potential contaminant
10 sources and pathways, gathered information to evaluate whether the site should be placed
11 on the NPL, assessed whether early action/removal activities were necessary, and
12 compiled information for future remedial activities. (Id.). As a result, in May of 2000,
13 the Midnite Mine Superfund Site was included on the National Priorities List ("NPL").
14 (Id. ¶ 5). In 1999, the EPA, again with the assistance of contractors, began performing a
15 Remedial Investigation/Feasibility Study ("RI/FS"), which is a comprehensive study of
16 the site and proposed cleanup alternatives. (Id. ¶¶ 9-10). The RI/FS included a human
17 health risk assessment, an ecological risk assessment, and an evaluation of remedial
18 technologies and cleanup alternatives. (Id. ¶ 11). The RI/FS was not concluded until
19 after December 31, 2004. In the meantime, the Spokane Indian Tribe developed its own
20 remedial plan. (Dfts. St. Fact ¶¶ 37-38).

21 In June of 2003, the EPA produced its draft Feasibility Study outlining a series of
22 cleanup alternatives. Perhaps unsatisfied with EPA's proposed cleanup alternatives, by
23 letter dated January 12, 2004, the Tribe invoked a dispute resolution mechanism provided
24 within a December 2000 Memorandum of Agreement between the EPA and the Spokane
25 Tribe. The stated intent of the Agreement was to "provide a mechanism for the exchange
26 of information between the EPA and the Tribe about decisions and actions at the Site
27 under CERCLA." (United States' Reply St. Fact ¶ 1). The dispute resolution process
28 provided a forum to address areas of disagreement between the Tribe and the

1 Government. (Def. St. Fact ¶ 40). The EPA met with the Tribe on January 28 and 29,
2 2004. Thereafter, the EPA included the Tribe's remedial alternative in the Feasibility
3 Study. (Def. St. Fact ¶ 47, ¶ 60). Several more dispute resolution meetings occurred
4 between the Tribe and EPA between December 2004, and May 2005. (Def. St. Fact ¶¶
5 50-52).

6 Then, in June of 2005, EPA presented its anticipated cleanup approach to the
7 National Remedy Review Board and received the Tribe's endorsement. (Def. St. Fact ¶
8 61; United States' Reply St. Fact ¶ 2). The EPA issued its proposed plan in September
9 2005. (United States' Reply St. Fact ¶ 2). After accepting public comments, the EPA
10 selected a remedy and issued its September 2006 Record of Decision (hereinafter
11 "ROD") (United States' St. Fact ¶ 14). According to Defendants, the selected remedy
12 contains aspects of the Tribe's alternative to an extent not explained by the administrative
13 record. (Def. St. Fact ¶ 62).

14 Prior to the Site being added to the NPL in 2000, Defendant Dawn incurred its own
15 costs for direct reclamation activities. In July of 1998, Dawn entered into an Interim
16 Agreement with the Bureau of Land Management for "preparation and performance by
17 the Companies of studies to be used in the planning and implementation of reclamation or
18 remediation activities and the Midnite (sic) Uranium Mine" pursuant to Dawn's
19 reclamation obligations under the 1964 leases. (Defendants' St. Fact ¶ 1). According to
20 the Defendants, the objective of the data collection corresponding to this study was to
21 "more fully characterize the Site and the nature and extent of hazardous substances
22 releases (if any) and impacts . . ." (Def. St. Fact ¶ 2). The resultant study cost
23 approximately \$3 million and included the collection and analysis of nearly 1200
24 samples.

25 Defendants contend that during the RI/FS process the EPA ignored the existence of
26 certain Interim Agreement data reports and therefore duplicated sampling that had
27 already been conducted as part of the Interim Agreement. The United States admits that
28 the EPA conducted sampling itself based upon its "data quality objective procedures", but

1 disputes that the sampling was unnecessary or inconsistent with the NCP. (United States
 2 Reply St. Fact ¶¶ 16-21).

3 II. Standard of Review

4 The purpose of summary judgment is to avoid unnecessary trials when there is no
 5 dispute as to the material facts before the court. *Northwest Motorcycle Ass'n v. United*
6 States Dept. of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled
 7 to summary judgment when, viewing the evidence and the inferences arising therefrom in
 8 the light most favorable to the nonmoving party, there are no genuine issues of material
 9 fact in dispute. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252
 10 (1986). While the moving party does not have to disprove matters on which the opponent
 11 will bear the burden of proof at trial, they nonetheless bear the burden of producing
 12 evidence that negates an essential element of the opposing party's claim and the ultimate
 13 burden of persuading the court that there is no genuine issue of material fact. *Nissan Fire*
 14 & *Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir. 2000).

15 Once the moving party has carried its burden, the opponent must do more than
 16 simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec.*
17 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1975). In meeting this burden, the
 18 "adverse party may not rest upon the mere allegations or denials of the adverse party's
 19 pleadings, but the adverse party's response, by affidavits or as otherwise provided in this
 20 rule, must set forth specific facts showing that there is a genuine issue for trial." *Miller v.*
21 Glenn Miller Productions, 454 F.3d 975, 987 (9th Cir. 2006) (quoting FED. R. CIV. P.
 22 56(e)).

23 III. Analysis

24 Pursuant to the Comprehensive Environmental Response, Compensation, and
 25 Liability Act (hereinafter "CERCLA"), the United States is entitled to recover "all costs
 26 of removal or remedial action incurred by the United States Government . . . not
 27 inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(A)(4); *see*
28 California v. Neville Chemical Company, 358 F.3d 661, 673 (9th Cir. 2004) (stating that

1 “[w]hether a party can recover certain costs under § 9607 depends on whether or not
2 those costs were incurred consistently with the ‘national contingency plan’”). The
3 national contingency plan is promulgated by the Environmental Protection Agency and
4 “provide[s] the organizational structure and procedures for preparing and responding to ...
5 releases of hazardous substances.” *Neville*, 358 F.3d at 673 (quoting 40 C.F.R. § 300.1).
6 It outlines specific steps parties must take in choosing a remedial action plan and cleaning
7 up hazardous waste. *Carson Harbor Village v. County of Los Angeles*, 433 F.3d 1260,
8 1265 (9th Cir. 2006); *see also Washington State Dept. of Transp. v. Washington Natural*
9 *Gas Co.*, 59 F.3d 793, 799 (9th Cir. 1995) (stating that the national contingency plan
10 “identifies methods for investigating the environmental and health problems resulting
11 from a release or threatened release and criteria for determining the appropriate extent of
12 response activities” (citation omitted)). The national contingency plan is “designed to
13 make the party seeking response costs choose a cost-effective course of action to protect
14 public health and the environment.” *Carson Harbor Village*, 433 F.3d at 1265 (quoting
15 *Washington State Dept. of Transp.*, 59 F.3d at 802).

16 When the Government is seeking recovery of response costs, consistency with the
17 national contingency plan is presumed. *Chapman*, 146 F.3d at 1170 (citing *Washington*
18 *State Dept. of Transp.* 59 F.3d at 800-01). Typically, response costs are proven by
19 response cost summaries, supporting data, and affidavits describing the response action
20 for which the cost were incurred. *See, e.g., United States v. Findett Corp.*, 220 F.3d 842
21 (8th Cir. 2000). Once the Government establishes liability under CERCLA, the burden
22 shifts to the defendants to prove the government’s actions were inconsistent with the
23 national contingency plan by being arbitrary and capricious or otherwise not in
24 accordance with law. *United States v. Chapman*, 146 F.3d 1166, 1171 (9th Cir. 1998);
25 *Washington State Dept. of Transp.*, 59 F.3d at 800-02. If the response cost issue is being
26 raise on summary judgment, as it is here, Defendants need only show that there exists a
27 genuine issue on inconsistency. *Chapman*, 146 F.3d at 1169; *Findett Corp.*, 220 F.3d at
28 849 (8th Cir. 2000).

1 The scope of review under the “arbitrary and capricious” standard is narrow and a
2 court is not to substitute its judgment for that of the agency. *Hopi Tribe v. Navajo Tribe*,
3 46 F.3d 908, 914 (9th Cir. 1995). Agency action satisfies this standard of review if the
4 agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its
5 action, including a ‘rational connection between the facts found and the choice made.’”
6 *Id.* However, if the government’s action is arbitrary and capricious, it is not entitled to
7 recover its response costs under CERCLA. *Washington State Dept. Transp.*, 59 F.3d at
8 805.

9 **A. Whether the Remedy Chosen by the United States in the ROD is
10 Arbitrary and Capricious:**

11 The Defendants argue that the Government cannot recover any of the response
12 costs incurred prior to December 31, 2004 because those actions contributed to the EPA’s
13 September 2006 ROD, which Defendants argue is not supported by the Administrative
14 Record because the effect of the dispute resolution process between the EPA and the
15 Tribe is not adequately addressed. To support this argument, Defendants rely on Fifth
16 Circuit case, *In re Bell Petroleum Servs. Inc.*, 3 F.3d 889, 904-908 (5th Cir. 1993).
17 Therein, Defendant Sequa Corporation challenged the EPA’s decision to provide an
18 alternate water supply as an interim measure pending the completion of final remedial
19 action for the cleanup of a contaminated aquifer. For various reasons, the Court
20 determined that the EPA’s decision to provide the alternate water supply was arbitrary
21 and capricious and therefore inconsistent with the national contingency plan. *Id.* at 907.
22 Accordingly, the Court determined that the EPA was not entitled to recover the costs of
23 *designing and constructing* the interim measure.

24 The Defendants’ reliance upon *In re Bell Petroleum Servs. Inc.*, 3 F.3d 889 (5th
25 Cir. 1993) to avoid all of the Government’s response costs is misplaced. The
26 Government does not seek costs incurred “designing and constructing” the remedy
27 selected in the September 2006 ROD. Instead, the Government seeks costs incurred
28 through December 31, 2004. For the most part, these costs were incurred studying and

1 understanding the site and developing a series of cleanup alternatives. In fact, the EPA
2 did not conclude the Remedial Investigation/Feasibility Study until after the period
3 relevant for the costs sought by this motion. In addition, the dispute resolution
4 discussions, which the Defendants argue unduly influenced the EPA's September 2006
5 ROD without explanation in the administrative record, began in January of 2004, but did
6 not conclude until May of 2005. The ROD was not issued until September 2006, and it is
7 unknown whether the Government has even begun implementing the ROD. Accordingly,
8 the Defendants' challenge to the ROD is premature. If the EPA failed to properly
9 document the impact of those discussions in the ROD, that deficiency, if any, occurred
10 after the period of response costs germane to the United States' motion. Accordingly,
11 whether the Government's selected remedy is not adequately supported by the
12 administrative record is an issue better reserved for another day and nothing in this Order
13 should preclude the Defendants from raising the issue at that time.

14 **B. Whether the EPA's Sampling-Related Activities were Duplicative and**
15 **Unnecessary:**

16 Defendants further argue that the EPA incurred substantial costs for sampling-
17 related activities during the Remedial Investigation that were duplicative and
18 unnecessary, therefore inconsistent with the NCP, and are accordingly, not recoverable
19 under CERCLA. *See United States v. E.I. Dupont De Nemours and Co. Inc.*, 432 F.3d
20 161, 179 (3rd Cir. 2005) (stating that "[c]osts that are unnecessary and excessive in light
21 of the National Contingency Plan are arbitrary and capricious and should be disallowed
22 under this standard of review). To support their argument, Defendants rely, in part, on
23 *Louisiana-Pac. Corp. v. Beazer Materials and Serv., Inc.*, 811 F. Supp. 1421, 1425 (E.D.
24 Cal. 1993), which the Court notes was followed by the decision in *Louisiana-Pacific*
25 *Corp. v. Beazer Materials & Servs., Inc.* 842 F. Supp. 1243 (E.D.Cal.1994) ("LP II"). In
26 LP I, the court suggested that the United States Environmental Protection Agency
27 ("EPA") might have acted in an arbitrary and capricious manner by duplicating a private
28 party's remedial investigation of a site. In LP II, the same court found that summary

1 judgment as to Louisiana Pacific's ("LP's") liability for particular costs was inappropriate
2 because some of the EPA's alleged duplicative actions may have been in retaliation for
3 LP's refusal to sign a consent decree, and therefore were potentially a violation of LP's
4 constitutional rights.

5 For the most part, Defendants rely on the declaration of Dawn's expert, Paul
6 Rosasco, wherein he states that at least \$2,275,000 of EPA's past response costs were
7 attributable to unnecessary or duplicative sampling that had already been performed by
8 Defendants' contractor SMI. (Def. St. Fact, Exh. 3, Rosasco Decl. ¶ 11). Pursuant to the
9 Interim Agreement between Dawn and the BLM, Dawn paid approximately \$3 million
10 for studies and investigations of the Site that resulted in nearly 1,200 samples being
11 taken. (Rosasco Decl. ¶ 4-5). A majority of the EPA's Remedial Investigation planning
12 and scoping activities occurred after the Interim Agreement investigations were complete,
13 and that data was available for the EPA's use. (Rosasco Decl. ¶ 8). Therefore, it is
14 Rosasco's opinion that "much of EPA's Remedial Investigation work failed to consider
15 or inadequately considered data collection pursuant to the Interim Agreement. . . [and]
16 [t]his resulted in EPA and its contractor undertaking unnecessary and duplicative
17 investigations that were not necessary to adequately characterize the site for purposes of
18 developing and evaluating effective remedial alternatives." (Rosasco Decl. ¶ 9).

19 The United States argues that Rosasco's declaration is somewhat undermined by
20 his own deposition. Rosasco admits that even when data already exists, it would be
21 legitimate for the EPA to take additional samples to verify prior sampling, to confirm an
22 existing sample is representative and not an anomaly, to see if conditions have changed
23 since the prior sampling occurred, to analyze different constituents, to use a different
24 sampling methodology, and to increase statistical confidence. (United States' Reply St.
25 Fact Exh. 6, Rosasco Dep. 100-117). Most significantly, Rosasco testified that he would
26 not be offering an opinion that any of the EPA's remedial investigation was inconsistent
27 with the NCP, although he thought the samples were unnecessary. (Rosasco Dep. 203).

28 Contrary to the assertions contained in Rosasco's declaration, the United States

1 asserts it has come forward with evidence that EPA knew about the data collected by
2 Dawn's contractor SMI, considered and relied upon the SMI data, and chose nonetheless
3 to take some of its own sampling. Correspondence from the EPA dated 1998 (email) and
4 1999 (letter) indicates the EPA was aware of SMI's data. (United States' Reply St. Fact
5 ¶¶ 12-13). In 2001, the Government's RI/FS contractor URS sent an email to Dawn's
6 contractor SMI asking for complete SMI data sets in order to develop the hydrological
7 model for the RI/FS. A letter from Michael F. Gearhard, Acting Director, Office of
8 Environmental Cleanup for the EPA to David W. Delcour, President of Dawn Mining
9 Company, dated July 1, 1999, regarding the RI/FS suggests that the government was
10 considering the SMI data in its study, but also considered the need for additional data.
11 Therein, he stated:

12 I must emphasize that the draft conceptual sampling plan is not "broad and
13 unfocused" as you characterized it in your letter. On the contrary, EPA
14 intentionally followed its data quality objective procedures to ensure that the
15 data identified will be what is needed to answer key remedial questions.
16 EPA plans to collect data that are necessary and sufficient to assess risks to
17 human health and the environment and to support the selection of a remedy
18 at the Site . . . Your letter and SMI's comments repeatedly imply that EPA
19 has overlooked data collected by SMI under the July 1998 Interim
20 Agreement between Dawn, Newmont . . . , and the Bureau of Land
21 Management (BLM). EPA and its consultants have reviewed the documents
22 submitted under this agreement and, where possible, incorporated the
23 information into our understanding of site conditions. Several of the key
24 documents referenced by SMI have been submitted very recently or have not
25 yet been submitted. Anticipating that some of the information in these
documents may affect the scope of work, EPA designed Phase I to include
work least likely to be affected by incoming SMI data, least likely to be
duplicative of existing studies, and most essential for determining whether
and to what extent cleanup will be necessary outside the disturbed area of
the mine.

(United States Reply St. Fact Exh. 5, pg. 137). This letter indicates that the EPA was
considering the data being provided by Dawn's contractor SMI very early on.

Viewing the evidence in the light most favorable to the Defendants', as this Court

1 must, the Court finds that Defendants' evidence is sufficient to raise an issue as to
 2 whether the EPA "examined the relevant data" and has "articulate[d] a satisfactory
 3 explanation" for its decision to conduct the sampling for the purpose of collecting data
 4 which was purportedly already in existence. *Hopi Tribe*, 46 F.3d at 914. Accordingly,
 5 Defendants have sufficiently raised a genuine issue on inconsistency with the NCP as to
 6 the sampling alleged to have been unnecessary and duplicative.

7 CONCLUSION

8 The Government has undeniably incurred \$12,867,441, plus interest, in response
 9 costs through December 31, 2004. The Court concludes the Government is able to
 10 establish, with admissible evidence, it has incurred necessary and recoverable response
 11 costs consistent with the NCP with the following exceptions:

12 1. The Agency for Toxic Substances and Disease Registry's activities at the
 13 site were inconsistent with the NCP and therefore the approximately \$520,000 in costs
 14 associated with that agency's actions are not recoverable.

15 2. The evidence is not sufficient to remove all genuine issues of material fact
 16 as to 1) whether the particular response costs specifically objected to by the Defendants
 17 can legitimately be characterized as duplicative and unnecessary, and 2) if so, whether the
 18 EPA has articulated a satisfactory explanation for the action taken. Such questions are an
 19 appropriate matter for the fact-finder to determine at trial.

20 For the foregoing reasons, the United States' Motion For Summary Judgment on
 21 the Issue of Response Costs (Ct. Rec. 130) is **GRANTED** in part and **DENIED** in part as
 22 herein stated.

23 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
 24 furnish copies to counsel.

25 **DATED** this 5th day of September, 2007.

26 s/ Justin L. Quackenbush
 27 JUSTIN L. QUACKENBUSH
 28 SENIOR UNITED STATES DISTRICT JUDGE